RECENT CASES

Corporations—Elections—Right of Holder of Fractional Share to a Fractional Vote—*Quo warranto* to oust X, Y and Z as directors of Pennsylvania corporation. 164 of corporation's 328 shares were owned by A. 160½ were owned by X; 2½ by Y; and 1 by Z. A corporation by-law entitled every shareholder to one vote per share. In voting for five directors, X, Y and Z cast 820 cumulative votes for themselves (273⅓ each). A cast 274 votes for himself as a director and 273 for each of two other individuals as directors. Judges of election declared A, X, Y and Z elected and a tie vote for the fifth director. *Held,* ouster of X, Y and Z granted. Fractional shares could not be used as a basis for voting, cumulatively or otherwise. The Pennsylvania Business Corporation Act, which authorizes casting one vote for every full share, does not authorize casting fractional votes for fractional shares. The corporation by-law does not conflict with the Business Corporation Act's provision authorizing issuance of fractional shares. *Commonwealth ex rel. Cartwright v. Cartwright,* 350 Pa. 638, 40 A. (2d) 30 (1944).

This is a case of first impression on the right of a holder of a fractional share in a corporation to cast a fractional vote.[1] Some legal encyclopedias state that shareholders may cast one vote for each share owned if so authorized by statute, charter or by-law,[2] and one declares that authorization in such terms excludes, by implication, fractional voting.[3] Examination of the cases cited as supporting these statements reveals that all of them can be distinguished on their facts from the instant case and none deals squarely with the question of a fractional share-holder's privilege of casting a fractional vote.[4] Pennsylvania's Business Corporation Act of 1933 contains a new section au-

1. *In re* Provident Building & Loan Ass'n of Passaic, 62 N. J. L. 590, 41 Atl. 952 (1898) excluded the casting of a full vote by fractional shareholders in a building and loan association wherein voting was based on membership (per capita) and not on ownership (per share). The court remarked: "A construction that permitted an unlimited number of votes to be cast upon one share would lead to farcical results." *Id.* at 591, 41 Atl. at 952.

2. 13 AM. JUR. (1938) § 485; 18 C. J. S. (1939) § 549; 5 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (Perm. ed. 1931) § 2045. At common law voting was based on membership rather than share ownership. See Williston, *History of the Law of Business Corporations before 1800* (1888) 2 HARV. L. REV. 105, 156.

3. 5 FLETCHER, *op. cit. supra* note 2, § 2045.

4. The following cases involved a question of whether the right to vote was per capita or per share: Procter Coal Co. v. Finley, 98 Ky. 405, 33 S. W. 188 (1895); Gregg v. Granby Mining & Smelting Co., 164 Mo. 616, 65 S. W. 312 (1901); *In re* P. B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502 (1907); *In re* Rochester Dist. Tel. Co., 40 Hun. 172 (N. Y. 1886); *In re* Remington Typewriter Co., 203 App. Div. 65, 196 N. Y. Supp. 309 (1st Dep't, 1922); State v. Gray, 20 Ohio App. 26, 153 N. E. 187 (1925); State *ex rel.* Schwab v. Price, 121 Ohio St. 114, 167 N. E. 366 (1929). The other cases cited and their voting questions are: Rogers v. Nashville, C. & St. L. Ry., 91 Fed. 299 (1898) (right of one shareholder owning majority of stock to vote it); Lucas v. Milliken, 139 Fed. 816 (1905) (right of owners of majority of stock to vote it and control corporation); Brooks v. State, 26 Del. 1, 79 Atl. 790 (1911) (conflict of voting provisions of a corporation charter and a statute with the state constitution); State v. Anderson, 31 Ind. App. 34, 67 N. E. 207 (1903) (validity of election of directors under provisions of corporate articles in conflict with statute); State v. New Orleans, J. & G. N. R. R., 20 La. 489 (1868) (right of city and state to vote shares owned by them); State v. McGann, 64 Mo. App. 225 (1895) (right to change during a meeting votes previously cast at the same meeting); Commonwealth v. Detwiler, 131 Pa. 614, 18 Atl. 990 (1890) (validity of by-law establishing proportionate share voting). The case cited in note 1 *supra* is authority for exclusion of votes by fractional shareholders to the extent indicated there.

thorizing issuance of certificates representing fractional shares or of scrip in lieu of such certificates but states that there shall be no voting rights for such scrip.[5] The lower court held that this section by implication confers the right to vote a fractional share. In overruling this holding the appellate court is in accord with the doctrine restricting statutory grants of power by implication.[6] The judgment harmonizes also with the history of voting rights in Pennsylvania. The Commonwealth's policy has been that all such rights are either directly granted by the legislature or indirectly legislatively granted by the statutory authorization to fix voting rights in articles of association.[7] The framers of the present Pennsylvania Constitution deliberately decided against the establishment of any constitutional prescription as to the number of votes each shareholder may have.[8] There is no basis for a claim to a fractional vote in the legislature's express authorization of one vote for every share [9] nor does the fact that the by-laws of the corporation in the instant case provided for one vote for every share lend credence to such a claim. Admittedly, the power to cast a fractional vote based on a fractional share would be relatively unimportant in elections of large corporations, but in a small one it may be decisive of control of the organization or board as in the instant case. Complications and confusion could result from fractional share voting since conceivably there could be one-thousandth of a share as well as one-half; [10] but a Pennsylvania corporation could avoid such confusion by exercising its power to issue scrip in lieu of fractional certificates. From the standpoint of taking the next logical step toward

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5. 15 PA. STAT. ANN. (Purdon, 1938) § 2852-608.

6. 50 AM. JUR. (1944) § 242; 59 C. J. (1932) §§ 575-6. The right to cast a vote based on ownership of a fractional share is not a necessary incident to the corporation's power to issue a certificate for such a share.

7. From the time that Pennsylvania chartered the first business corporation in this country, in 1768—see Williston, *loc. cit. supra* note 2, at 165—until the present, all corporate voting rights have been so bestowed. Prior to 1874 Pennsylvania corporations were formed either by special act of the legislature or by compliance with statutes for the formation of corporations in certain specified activities. Representative of an express grant of voting rights in a special act is 7 PA. STAT. AT L. 174 (1768); representative of voting rights expressly granted in a general statute for the incorporation of specified activities is (1836) PA. LAWS 799. An example of indirect authorization in a special act by leaving determination to the corporation by-laws is 12 PA. STAT. AT L. 412 (1787). Pennsylvania's first general incorporation act was enacted in 1874 and provided expressly for one vote per share; this provision was unchanged in subsequent amendments and the Business Corporations Act of 1933. 15 PA. STAT. ANN. (Purdon, 1938) §§ 103, 2852-504. Corporations are, however, authorized to fix different voting rights or no voting rights by their articles. 15 *id.* §§ 2852-504, 2852-601.

8. On the first reading of the article on corporations, the proposed section 11 thereof was: "In all elections for the managing officers of a corporation each member or shareholder *shall have as many votes as he has shares, multiplied by the number of officers to be elected; and he* may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates as he may prefer." 4 DEBATES PENNSYLVANIA CONSTITUTIONAL CONVENTION (1873) 192. On the second reading, a motion to strike out the words italicized above was made and carried by a 27 to 26 division of the delegates. 5 *id.* at 758, 761. With change of "the managing officers" to "directors or managers," the amended section was adopted on its third reading. 7 *id.* at 762. It is now section 4 of Article XVI of the Pennsylvania Constitution. The object of striking out the words was to prevent affecting voting rights in then existing old corporations. 5 *id.* at 761; 6 *id.* at 37. The delegates intended that the section adopted would have nothing to do with the number of votes and that its effect would be that the legislature would determine the question of how many votes each shareholder should poll. 5 *id.* at 765; 6 *id.* at 38.

9. 15 PA. STAT. ANN. (Purdon, 1938) § 2852-504.

10. Recognition of this potential confusion is evident in the practice of corporations, particularly of any size, issuing fractional warrants or scrip rather than a certificate for a fractional share. 19 FLETCHER, *op. cit. supra* note 2, §§ 8977, 9046.

making control completely co-extensive with ownership [11] the legislature should enact that in the absence of contrary provisions in the articles of association, there shall be a fractional vote equivalent to the fractional share owned. Until the legislature does so or until the court has before it articles of association providing for fractional voting there appears to be no justification for judicial recognition of fractional voting.

International Law—Effect of Non-Recognition of Foreign States—In September 1941, The United States War Shipping Administration requisitioned the S.S. Maret,[1] a ship of Estonian registry, the beneficial ownership of which rested in Estonian citizens. The War Shipping Administration deposited with the Treasurer of the United States compensation which by statute was subject to any valid claim by way of maritime lien upon the vessel existing at the time of requisition. The newly established (June 1940) but as yet unrecognized Soviet Socialist Republic of Estonia, (which came into existence after the U. S. S. R. occupied Estonia in June of 1940) passed certain decrees in October of 1940 purporting to nationalize Estonian ships such as the Maret. Libelant, as agent for the new government, seeks a part of the fund to pay for the value of supplies which the captain, recognized by the present functioning government but not by the old government of Estonia, laid in for a voyage to Murmansk. Claimant in the action is the acting Estonian Consul General at New York defending on behalf of the beneficial owners of the Maret. *Held,* that because a policy of non-recognition when demonstrated by the executive branch of the government must be deemed to be an affirmative act, the courts of the United States may not examine the effect of the decrees of an unrecognized sovereign and determine rights in property subject to those decrees.[2]

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11. The history of corporate voting rights in Pennsylvania in addition to revealing the statutory origin of all voting rights greater than the common-law rule of one vote per member regardless of ownership, also mirrors the evolution from this common-law rule to the modern doctrine of control based on ownership. Types of voting which have existed in this Commonwealth and a statute illustrative of each type are:

1. Single vote based on membership rather than amount of ownership. 7 PA. STAT. AT L. 174 (1768).
2. Votes based on an upward progression in the number of shares owned with a limit on the total number of votes. (1826) PA. LAWS 80.
3. Votes based on an upward progression in the number of shares owned without limit on the total number of votes. (1836) PA. LAWS 799.
4. A vote for each share with "a specified percentage of the total votes cast" limit per shareholder. (1849) PA. LAWS 564.
5. A vote for each share with no limits. 15 PA. STAT. ANN. (Purdon, 1938) § 2852-504.
6. Votes determined by the articles of association. 15 PA. STAT. ANN. (Purdon, 1938) § 2852-504. This type would appear to be limited only by human ingenuity to devise such rights not in conflict with other constitutional or statutory provisions. All of the special rights of this type could be ascertained only by an examination of all articles of corporations availing themselves of this provision and of the by-laws of such old or former corporations as were incorporated with such a provision by special acts of the legislature.
7. No vote. 15 PA. STAT. ANN. (Purdon, 1938) § 2852-601.

1. Executive Order of Feb. 7, 1942 (see 7 F. R., No. 28, 837, Feb. 10, 1942) made pursuant to the Act of June 6, 1941, c. 174, 55 STAT. 242 (1941), 50 U. S. C. A. App. § 1271 (1944).

2. Judge Goodrich concurred in the result on the ground that to deny effect to an act of a foreign government which purports to change ownership of a chattel many hundreds of miles away from its borders is not improper.

Amtorg Trading Corporation v. The fund resulting from the requisitioning of the S.S. Maret, the United States of America and The United States Maritime Commission, and Kaiv, acting Consul General of Estonia (C. C. A. 3d, Oct. 17, 1944).

Whether to grant recognition to a foreign government or withhold it is for the executive branch of the government to decide.[3] Its recognition of a foreign government normally requires the courts of the United States to accept the legal consequences of the laws and administrative acts of such recognized foreign government with respect to persons and property within the United States.[4] But does it necessarily follow that if the executive branch *withholds* recognition, the courts are thereby precluded from according any legal effect to the laws and administrative acts of such unrecognized government, even though the government is a government *de facto?* Judge Cardozo and Professor Borchard assert that the basic test as to the effect of foreign decrees in the United States courts is not whether recognition has been extended, but rather whether the foreign law would work an injustice or contravene the public policy of the forum.[5] The principle suggested by these authorities could lead to a result in the instant case opposite to that reached by the court under its theory. Inasmuch as there is a diversity of authority in the lower courts,[6] and as the Supreme Court has not passed upon the immediate question, it is appropriate to inquire which approach is more desirable. It is submitted that international activities should be dealt with from a long-range perspective in favor of the continuous collaboration of states with a view to bringing about a more harmonious feeling both among peoples of the world and states as members of the community of nations. The withholding by courts of recognition of foreign decrees merely because of non-recognition by the executive is a form of judicial boycott, and like an economic (or political) boycott, can readily, when combined with other inamicable acts, cause international disharmony. If we assume that recognition will at some time be granted, the view taken by the Circuit Court may well cause recovery to depend upon the time when the action is brought. Claimant fails in the present case because the executive branch had not yet recognized the new Estonian government at the time of the suit. *Query,* whether such a claimant will not succeed if he waits to bring his action until after recognition has been extended by the executive? The answer to this would appear to be Yes, in the light of the Supreme Court

3. United States v. Pink, 315 U. S. 203, 62 Sup. Ct. 552, 86 L. Ed. 796 (1942).

4. United States v. Belmont, 301 U. S. 324, 57 Sup. Ct. 758, 81 L. Ed. 1134 (1937); Shapliegh v. Mier, 299 U. S. 468, 57 Sup. Ct. 261, 81 L. Ed. 355 (1937); United States v. Pink, 315 U. S. 203, 62 Sup. Ct. 552, 86 L. Ed. 796 (1942). However, the courts of the United States are permitted to deny effect to those laws and acts which are contrary to the public policy of the forum.

5. Judge Cardozo's views are expressed in his opinions of the case of James & Co. v. Second Russian Reinsurance Co., 239 N. Y. 248, 146 N. E. 369 (1924) and Sokoloff v. Nat'l City Bank, 239 N. Y. 158, 145 N. E. 917 (1924). Borchard, *The Unrecognized Government in American Courts* (1932) 26 AM. J. INT. L. 261. See also Connick, *The Effect of Soviet Decrees in American Courts* (1925) 34 YALE L. J. 499; Fraenkel, *The Juristic Status of Foreign States, Their Property and Their Acts* (1925) 25 COL. L. REV. 544.

6. In accord with the view expressed by the court in the instant case: The Kotkas, 35 F. Supp. 983 (E. D. N. Y. 1940); The Regent, 35 F. Supp. 985 (E. D. N. Y. 1940); The Florida, 133 F. (2d) 719 (C. C. A. 5th, 1943), *cert. denied,* 319 U. S. 774, 63 Sup. Ct. 1439, 87 L. Ed. 1721 (1943). *Contra:* Irish Free State v. Guaranty Safe Deposit Co., 233 App. Div. 90, 251 N. Y. S. 104 (1st Dep't, 1931), *aff'd,* 257 N. Y. 618, 178 N. E. 819 (1931); James & Co. v. Second Russian Reinsurance Co., 239 N. Y. 248, 146 N. E. 369 (1924); Sokoloff v. Nat'l City Bank, 250 N. Y. 69, 164 N. E. 745 (1928). See also Dickenson, *Recognition Cases 1925-30* (1931) 25 AM. J. INT. L. 229-34.

decisions which hold that *de jure* recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.[7]

Judgments—Full Faith and Credit—Enforcibility in Tennessee of North Carolina Judgment for Alimony—W secured a money judgment in North Carolina for accrued alimony in connection with a decree for separate maintenance without divorce which had been rendered previously. The initial decree had been awarded under a statute which reserved to the rendering court the right to modify the "order of allowance" at any time on the application of either party.[1] W sued in Tennessee to enforce the North Carolina judgment. *Held,* the judgment is entitled to full faith and credit under the United States Constitution since the statute did not extend the right of modification to allowances accrued or judgments thereon. *Barber v. Barber,* 323 U. S. 77, 65 Sup. Ct. 137, 89 L. Ed. (Adv. Ops.) 114 (1944).

Article IV, section 1 of the Constitution,[2] as implemented by the Act of May 26, 1790,[3] requires that judgments of state courts shall be given the same faith and credit in other states as they have in the state where rendered. Congress might have enacted a statute which would require that execution be issued directly on the judgment of a sister state.[4] Likewise the Court in interpreting the full faith and credit clause and the supplementary enactment which Congress did pass, might have established a similar rule.[5] Neither occurred in the development of full faith and credit law. Such an act was not passed by Congress; nor has the Court ever so interpreted the enactment which Congress did make.[6] The proper method

7. Oetjin v. Central Lumber Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726 (1917); Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716 (1877); Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456 (1897).

1. GENERAL STATUTES OF N. C. 1943 (Michie, 1943) § 50-16, which provides: "If any husband shall separate himself from his wife and fail to provide her . . . with the necessary subsistence . . . the wife may institute an action . . . to have a reasonable subsistence . . . allotted and paid or secured to her. . . ." The statute further declares: "The order of allowance herein privided for may be modified or vacated at any time, on the application of either party or of anyone interested."

2. "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

3. ". . . The records and judicial proceedings of the courts of any State . . . shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." 1 STAT. 122 (1790), 28 U. S. C. A. § 687 (1928).

4. "From the history of the [full faith and credit] clause, as well as from its wording, it may be said to be clear that under any fair interpretation of the grant of power to Congress in the full faith and credit clause, that body can provide for the enforcement of state judgments in other States, without the wholly useless and unnecessary process of requiring a new suit on the same and the obtaining of a new judgment upon which execution can be had." Cook, *The Powers of Congress Under the Full Faith and Credit Clause* (1919) 28 YALE L. J. 421, 430.

5. "In the United States under the 'full faith and credit' clause of the Constitution supplemented by the Congressional Act of May 26th, 1790, it might have been held that execution should be issued directly upon the judgment of a sister state." 2 BEALE, CONFLICT OF LAWS (1935) § 433.1.

6. On the contrary: "By the law of 26th of May, 1790, the judgment [of a sister state] is made a debt of record not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution." M'Elmoyle v. Cohen, 13 Pet. 312, 325, 10 L. Ed. 177, 183 (U. S. 1839).

by which to enforce a judgment which imposes a duty to pay money is by an action on the judgment in the state where execution is desired.[7] For such an action one of the prerequisites is that the judgment sued upon must be, by the law of the state where rendered, a final judicial determination of the right to payment.[8] So far as decrees for alimony are concerned, finality becomes a problem when the alimony is to be paid in installments and the rendering court is empowered to modify its decree. The dogma is clear that as to all accrued installments which are not subject to modification, an action to enforce payment must be permitted by a sister state.[9] The Court in the instant case was presented with a set of facts which *a fortiori* would appear to require enforcement of the claim, for here the installments were not only past due but had also been reduced to a further judgment which was in every conceivable sense as final as any money judgment can be. The decision of the Court is manifestly correct and it is submitted that a determination of the power of the North Carolina court to modify an order either as to prospective installments or as to past due installments not yet reduced to further judgment is unnecessary in view of the fact that the accrued installments in this case had already been so reduced. It is interesting to note, however, that in testing finality the Court analyzed the North Carolina statute in the light of an earlier command that "every reasonable implication must be resorted to against existence of" a power to modify or revoke installments of alimony already accrued "in the absence of clear language manifesting an intention to confer it." [10] Greatest interest will undoubtedly be aroused by the concurring opinion of Mr. Justice Jackson [11] who felt that the court was not going far enough and that finality is not at all a requirement for the granting of full faith and credit. As has been noted above, a literal interpretation of the full faith and credit clause either alone or in connection with the implementing act, might have produced the result which Mr. Justice Jackson describes as presently existing. Perhaps such a system of full faith and credit would be more desirable than the one which we have today. Perhaps Congress or the Court will or should move to adopt it.[12] That is a matter upon which

7. "To give . . . [the judgment of a sister state] the force of a judgment in another state, it must be made a judgment there. . . ." M'Elmoyle v. Cohen, 13 Pet. 312, 325, 10 L. Ed. 177, 183 (U. S. 1839). RESTATEMENT, CONFLICT OF LAWS (1934) § 434, comment *a*.

8. Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068 (1910); Israel v. Israel, 148 Fed. 576 (C. C. A. 3d, 1906); Lucas v. Vulcan Iron Works, 233 Fed. 823 (M. D. Pa. 1916); Green v. Green, 239 Ala. 407, 195 So. 549 (1940); Dow v. Blake, 148 Ill. 76, 35 N. E. 761 (1893); Ades v. Ades, 70 Ohio App. 487, 45 N. E. (2d) 416 (1942); Levine v. Levine, 95 Ore. 94, 187 Pac. 609 (1920); Dunn v. Hild, 125 Pa. Super. 380, 189 Atl. 746 (1937); Lubell v. Sutton, 164 S. W. (2d) 41 (Tex. Civ. App. 1942). RESTATEMENT, CONFLICT OF LAWS (1934) § 435; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) § 211; 2 BEALE, CONFLICT OF LAWS (1935) § 435.1; 3 FREEMAN, JUDGMENTS (5th ed. 1925) § 1391.

9. Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068 (1910); Barber v. Barber, 21 How. 582, 16 L. Ed. 226 (U. S. 1858); Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810 (1910). RESTATEMENT, CONFLICT OF LAWS (1934) § 464; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) § 135.

10. Sistare v. Sistare, 218 U. S. 1, 22, 30 Sup. Ct. 682, 688, 54 L. Ed. 905, 912, 28 L. R. A. (N. S.) 1068, 1077 (1910).

11. Mr. Justice Jackson's views in his concurring opinion were expanded in a scholarly and interesting fashion in an address entitled, "Full Faith and Credit—the Lawyer's Clause of the Constitution," delivered by him on December 7, 1944. The full text of the address appears in the N. Y. L. J., Dec. 18, 1944, p. 1739, col. 1.

12. The implications of the Court's decision in Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 64 Sup. Ct. 208, 88 L. Ed. (Adv. Ops.) 161 (1943) indicate a tendency toward greater federalism in the conflict of laws field. See Wolkin, *Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern?* (1944) 92 U. OF PA. L. REV. 401.

reasonable men might well differ. But beyond dispute would appear to be the existence of a rule, more often assumed than discussed, that finality of a judgment is a prerequisite to its enforcibility in another state.[13] It is a proposition which appears to be imbedded in our full faith and credit thinking up to this point.

Labor Law—Union Initiation Fees—Illegal Union Objective—Peaceful Picketing—A union organizer, having succeeded in unionizing the truck drivers of a number of gasoline distributors, attempted for some time to unionize the eight truck drivers of the plaintiff employer, but without success. Some were willing to join without paying the initiation fee. Subsequently, the union organizer asked the employer to pay the initiation fees of his employees, in order that they might qualify as union members. This the employer refused to do, although on a former occasion he had done so for two of his employees. The union thereupon posted at some times one and at other times two pickets in front of the employer's gasoline storage plant. They peacefully carried "Unfair to organized labor, A. F. L." signs, with the result that the employer's gasoline supplies were substantially reduced because truck drivers who supplied the employer refused to cross the picket line. *Held,* an injunction enjoining all picketing was properly granted. Although picketing is protected by the 14th amendment, insofar as it incorporates the right of freedom of speech, it may be enjoined where its purpose is for an unlawful objective.[1] The court found as a matter of fact that the "real objective was to compel plaintiffs to put their drivers in defendant union by paying their initiation fees, regardless of whether or not the drivers wished to join."[2] *Silkworth et al. v. Local No. 575 of American Federation of Labor,* 16 N. W. (2d) 145 (Mich. 1944).

It is submitted that this result is inconsistent with the *Swing*[3] case and its recent reaffirmation in *Cafeteria Employees Union, Local 302 v. Angelos,*[4] both cited in the court's opinion. In those cases, likewise, the employees refused to join the union, and there was no dispute between them and their employer; yet, the court held that an outside union could not be enjoined from peacefully picketing in order to bring pressure on the employer to employ union members only.[5] To attempt to justify the difference in result on the ground that in the present case the union is seeking to have

13. See note 8 *supra.*

1. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) § 114. Lafayette Dramatic Productions, Inc. v. Ferentz, 305 Mich. 193, 9 N. W. (2d) 57 (1943).

2. There was conflicting evidence on the initiation fees demand, which the court quoted. The union organizer testified in effect that he did not care who paid the fees, but the employees would have to join the union. One receives the impression that the court seized upon this element as an excuse for not following the United States Supreme Court decision in Cafeteria Employees Union, Local 302 v. Angelos, 320 U. S. 293, 64 Sup. Ct. 126, 88 L. Ed. 60 (1943).

3. American Federation of Labor v. Swing, 312 U. S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855 (1941), 89 U. OF PA. L. REV. 825; Note (1941) 90 U. OF PA. L. REV. 201.

4. Cafeteria Employees Union, Local 302 v. Angelos, 289 N. Y. 498, 46 N. E. (2d) 903, *rev'd,* 320 U. S. 293, 64 Sup. Ct. 126, 88 L. Ed. 60 (1943), 91 U. OF PA. L. REV. 767.

5. In the *Angelos* case, the employer formed a partnership with his employees in order to be able to say that no employees worked for him. An injunction against picketing was granted, but the United States Supreme Court upon certiorari reversed the judgment.

the employer pay the initiation fees of his employees in order to force them to join the union is without merit.[6] According to the *Swing* and *Angelos* cases, it is not a valid answer for the employer to say that the union is compelling him to force the employees to join against their will or to discharge them. This was the very purpose of the picketing; and the Supreme Court held it could not be enjoined. Of course the employer has an alternative: namely, to continue the conflict without an injunction and in the present case he can continue it by refusing to pay the initiation fees. Should he decide, as the union wishes him to decide, that it is cheaper for him to pay the initiation fees of his employees, it would not be illegal for him to do so.[7] But this decision holds all picketing illegal if the union suggests the solution. It is to be noted that the employer would in effect be bringing less pressure on his employees in this case, than by telling them to pay their own fees and join, or be fired. It is to be especially noted that the employer is asked to do what the employees must do to join. Courts have repeatedly held that unions may set up reasonable requirements for admission,[8] and reasonable initiation fees seem to fall in that category. It is not, however, surprising that the court decided as it did. The states have not given up hope that they shall continue to wield power in regulating labor-industry disputes of this nature, and that the United States Supreme Court in identifying picketing in many cases with free speech has reached a zenith from which it will recede.[9] Whether this is so will likely be settled only after the war, when labor disputes are expected to flare up. But the fact that a number of states have by statute or court decision held picketing for a closed shop illegal [10]—which decisions have not been challenged in the United States Supreme Court—gives the states renewed hope.

Real Property—Validity of Deed Delivered After Death of Co-Grantor—In 1918, H and W joined in the execution of a deed to Blackacre, naming their two sons as grantees. In 1920, H died, the deed never having been delivered during his lifetime. Under H's will, W was the sole devisee of his property. In 1936, W delivered the deed to one of the grantees named therein, and in 1943 she died. Suit by devisee of grantee

6. The distinction seems to be of such a technical nature as the courts found formerly to curb peaceful picketing by judicial ingenuity. Cooper, *The Fiction of Peaceful Picketing* (1936) 35 MICH. L. REV. 73.

7. There was no state statute which would make such conduct an "unfair" labor practice. The employer who has a legitimate interest in the establishment of working conditions is privileged to encourage employees to make use of a bargaining agent of which he does not maintain control. *See* American Furniture Co. v. I. B. of T. C. & H. of A. etc., Local 200 of Milwaukee, 222 Wis. 338, 371, 268 N. W. 250, 265 (1936). But where it was made unlawful by statute for a common carrier to refuse to carry goods tendered to it for transportation by the public, a union has been enjoined from requiring its members to refrain from handling the merchandise of an employer with whom union was in dispute. Burlington Transp. Co. v. Hathaway, 12 N. W. (2d) 167 (Iowa 1943).

8. National Protective Ass'n of Steamfitters and Helpers v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902); Senn v. Tile Layers Protection Union, 301 U. S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229 (1937).

9. Teller, *Picketing and Free Speech* (1942) 56 HARV. L. REV. 180; Teller, *Picketing and Free Speech: A Reply* (1943) 56 HARV. L. REV. 532. *Cf.* Dodd, *Picketing and Free Speech: A Dissent* (1943) 56 HARV. L. REV. 513; Larson, *May Peaceful Picketing Be Enjoined?* (1944) 22 TEX. L. REV. 392.

10. Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 48 N. E. (2d) 1; TELLER, *op. cit. supra* note 1, §§ 114, 117, and (Supp. 1943) §§ 114, 117.

to whom the deed was delivered against devisee under W's will. *Held* (two judges dissenting without opinion), the delivery of the deed by W, although eighteen years after execution and although at the time of execution W had but an inchoate right of dower, effectively conveyed the land to the grantees named in the deed. Plaintiff is therefore entitled to her testator's interest as grantee in the deed. *Creighton v. Elgin,* 56 N. E. (2d) 825 (Ill. 1944).

Until delivery a deed does not constitute a valid conveyance.[1] In a previous Illinois case, the court said, "Delivery is the final act on the part of the grantor by which the purpose of the conveyance is consummated, and without it all other formalities are insufficient to render it effectual as an instrument of title." [2] In spite of conflicting evidence, the court felt in the instant case that a valid delivery of the 1918 deed had been made in 1936. This being so, the deed took effect and became operative as of 1936, the time of its delivery.[3] A complete and delivered deed transfers title to the grantee of so much of the grantor's title as it purports to convey and so much as the grantor has.[4] Obviously, by executing a new deed and delivering it to her son, W could have validly conveyed any of her interest in the property at the time. But could she, by delivery after the death of her co-grantor, convey her interest as owner in fee, although she had only an inchoate right of dower when the deed was executed? The problem seems to narrow down to two issues. First, what effect, if any, does the death of a co-grantor of the deed have upon the ability of the surviving grantor to convey any interest whatsoever by delivery subsequent to co-grantor's death? Secondly, does delivery by a surviving grantor, if it conveys anything, convey only the interest said grantor had at the time of execution of the instrument, or does it convey the interest of the grantor at the time of delivery? The instant case raises these problems for the first time in Illinois. Elsewhere, cases on point are rare. In a Pennsylvania case,[5] the only decision relied upon in the opinion, a husband and wife had executed a deed for lands of the wife. The deed was offered to the grantee, but he refused to accept. Subsequently the wife died, and the grantee accepted delivery of the deed from the husband. The court held that delivery of the deed by the husband, passed only title to his individual interest in the property at the time of delivery, and the interest vested in the wife's heirs could not be divested by husband's delivery subsequent to wife's death. It should be noted, however, that husband's interest, small as it may have been, was effectually conveyed. In an Ohio Appeals

1. Town of Lexington v. Ryder, 269 Mass. 566, 6 N. E. (2d) 828 (1937); Newton v. Village of Glen Ellyn, 374 Ill. 50, 27 N. E. (2d) 821 (1940); Huber v. Williams, 328 Ill. 313, 170 N. E. 195 (1930); Montgomery v. Varley, 104 N. J. Eq. 83, 144 Atl. 183 (1929); Witham v. Witham, 156 Ore. 281, 66 P. (2d) 281 (1937). In Hague v. Hague, 114 Pa. Super. 432, 174 Atl. 598 (1934) deeds were found in a safe deposit box after death of the grantor, and the grantees recorded. In affirming a portion of the trial court's decree cancelling recordation of the deeds, the court pointed out that delivery was essential to convey title.

2. Evans v. Tabor, 350 Ill. 206, 182 N. E. 809 (1932).

3. Barncord v. Kuhn, 36 Pa. 383, 389 (1860); Bear v. Milliken Trust Co., 336 Ill. 366, 384, 168 N. E. 349, 356 (1929); Chase v. Woodruff, 133 Wis. 555, 113 N. W. 973 (1907).

4. Smith v. Cresby, 86 Tex. 15, 23 S. W. 10 (1893); Copelin v. Williams, 152 Ga. 692, 111 S. E. 186 (1922); People v. Ladew, 204 App. Div. 903, 197 N. Y. Supp. 937 (4th Dep't, 1922), *rev'd,* 237 N. Y. 413, 431, 143 N. E. 238, 244 (1924); McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604 (1900) (held that a deed executed by a partner, though ineffective to convey partnership property, may transfer whatever interest the partner has).

5. Shoenberger's Exrs. v. Zook, 34 Pa.. St. 24 (1859).

decision,[6] the court made this statement: ". . . after the death of her husband and when her dower had become vested, we know of no good reason why Mrs. Goodman could not . . . instead of executing a new conveyance make the one she had already executed effectual by knowingly delivering the same for the purpose of conveying her dower interest to the son." [7] In an early Pennsylvania case,[8] the court was called upon to decide the validity of a deed executed by a married woman, subsequently delivered by her after her husband's death. The deed when first executed was void because of a failure to meet statutory requirements concerning acknowledgments by *femes covert*. The court seems to have assumed that the death of one of the grantors would not affect the surviving grantor's ability to convey effectively, by delivery of the deed, any interest which the surviving grantor may have in the property covered by the deed. Not only was the eventual delivery held to convey a greater interest than the surviving grantor had at the time of the deed's execution, but also this greater interest was effectively transferred by a deed "void" at its execution. It is submitted that the decision of the majority in the instant case follows what few precedents there are. It is sound from the standpoint of the general tendency of property law not to adhere rigidly to historical and technical requirements where the result is to render ineffectual the obvious intent of grantors.[9]

Taxation—Federal Immunity—Property of Defense Plant Corporation—Beaver County, Pa., in assessing the real property of the Defense Plant Corporation, an instrumentality of the United States, included the full value of machinery owned by that corporation on the ground that such machinery was real property within the meaning of the federal statute authorizing state or local taxation of the real property of the corporation "to the same extent according to its value as other real property is taxed." [1]

6. Goodman v. Goodman, 20 Ohio App. 419, 152 N. E. 200 (1926). H and W made a deed of gift. This deed remained in H's desk until his death. H left no will, and title to the property covered by the deed descended to his son, subject to the dower interest of W. The son was also grantee under the deed. Shortly thereafter, W delivered the deed to the son, stating that she was carrying out the wishes of her deceased husband. Subsequently, W sought to re-establish her dower right in the property by having the deed set aside. Counsel contended that the deed not having been delivered during H's life-time, no interest was conveyed to his son by delivery after his death; and inasmuch as the deed was void for want of delivery, it could not operate to convey W's interest in the property. The court replied: "With this contention we cannot agree. We are familiar with the general rule that a release in a deed by the wife of the inchoate right of dower stands or falls with the instrument in which it is contained. Such release being only an incident to the conveyance, if the conveyance fails such dower reverts eo instanto to the wife. But we do not find that the reasons for the rule apply to the transfer of a dower interest which has become vested." *Id.* at 419, 152 N. E. at 200-1.

7. The language of the *Goodman* case was quoted with approval in Miller v. Miller, 110 Ind. App. 191, 38 N. E. (2d) 343 (1942). H and W executed deeds to lands that each owned. Deeds were placed in a bank box and were not delivered to the grantee until 19 years after H's death. W was H's sole heir at law. Subsequently W died and her next of kin brought an action to quiet title, claiming that the deeds were void at the time of delivery. In sustaining the deeds as valid conveyances, the court pointed out that the death of H would not destroy the efficacy of the deeds to convey lands presently owned by W.

8. Jourdan v. Jourdan, 9 S. & R. 268 (Pa. 1823).

9. Clark v. Cammack, 216 Ala. 346, 113 So. 270 (1927); Babb v. Dowdy, 229 Ky. 767, 17 S. W. (2d) 1014 (1929) (liberal construction given to deeds artificially drawn); Laing v. McClung, 103 W. Va. 341, 137 S. E. 744 (1927); Pelletier v. Langlois, 130 Me. 486, 157 Atl. 577 (1931).

1. 55 STAT. 248 (1941), 15 U. S. C. A. App. § 610 (1944).

Held, machinery of the Defense Plant Corporation is taxable under the statute. *Appeal of Defense Plant Corp.,* 350 Pa. 520, 39 A. (2d) 713 (1944).

It is now generally accepted that Congress in creating a federal instrumentality may waive or limit the immunity from state taxation which that instrumentality would otherwise enjoy under the Federal Constitution.[2] Thus, there is little question that Congress may validly authorize state or local taxation of the property owned by the Defense Plant Corporation. The real problem in the instant case is whether or not the machinery in question is "real property" within the meaning of the statute authorizing the tax. Pennsylvania has long held that machinery necessary to the existence of a factory as such is taxable as real property under the state tax statute involved.[3] Appellant's contention that this rule may not be applied in the instant case is based upon the argument that Congress intended to subject to taxation only property which would be classified as real property throughout the states generally. Under the facts of this case that contention fails,[4] even if the argument is correct—but is it? It seems not. This

2. "But the sovereignty whose means or agencies of government would be affected by the tax might render it lawful by its assent . . ." COOLEY, CONSTITUTIONAL LAW (4th ed. 1931) 72; 1 HARE, CONSTITUTIONAL LAW (1885) 471. This principle has been recognized in Salem Rich v. Packard Nat'l Bank, 138 Mass. 527 (1885) and in Austin v. The Aldermen, 7 Wall. 694, 699, 19 L. Ed. 224, 226 (U. S. 1868), in which the Court said: "It is well settled that the States cannot exercise this authority [of taxation] in respect to any of the instrumentalities which the general government may create for the performance of its constitutional functions. It is equally well settled, that this exemption may be waived wholly, or with such limitations and qualifications as may be deemed proper, by the law-making power of the nation. . . ." *Cf.* Des Moines Nat'l Bank v. Fairweather, 263 U. S. 103, 44 Sup. Ct. 23, 68 L. Ed. 191 (1923); Baltimore Nat'l Bank v. Tax Comm., 297 U. S. 209, 56 Sup. Ct. 417, 80 L. Ed. 586 (1935). On the problem of constitutional immunity itself, see (1944) 93 U. OF PA. L. REV. 99, and cases cited therein.

3. "Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold." Voorhis v. Freeman, 2 W. & S. 116, 119 (Pa. 1841). This has given rise to a doctrine based upon it, peculiar to Pennsylvania and known as the "Pennsylvania Rule," which allows even unattached equipment to be considered real property. Seeger v. Pettit, 77 Pa. St. 437, 18 Am. St. Rep. 452 (1875); Titus v. Poland Coal Co., 275 Pa. 431, 119 Atl. 540 (1923); Pennsylvania Chocolate Co. v. Hershey Bros., 316 Pa. 292, 175 Atl. 694 (1934). PA. STAT. ANN. (Purdon, Supp. 1943) tit. 72, § 5020-201, which enumerates the subjects of taxation, provides in part: "The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

"(a) All real estate, to wit: Houses, lands, lots of ground, and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation." Also see Patterson v. Delaware County, 70 Pa. 381 (1872), where this statute was applied.

4. In the principal case, although there was some controversy as to the facts, it appears that all the machinery with the exception of five five-ton electric trucks were attached in some way to the realty. Therefore, even if appellant's point were well taken and the test of real property is to be the view of the majority of jurisdictions and not the "Pennsylvania Rule," it would avail him nothing since, when the machinery is essential to or even adapted to the purpose of the realty, and there is some attachment between it and the realty, the majority of jurisdictions that have considered the point hold such machinery a part of the freehold, taking into account the construction put on the facts by local law. Southern Cotton Oil Co. v. Lowery, 231 Ala. 119, 163 So. 629 (1935); Ozark v. Adams, 73 Ark. 227, 83 S. W. 920 (1904); Dauch v. Ginsberg, 214 Cal. 540, 6 P. (2d) 952 (1931); Horn v. Clark Hardware Co., 54 Colo. 522, 131 Pac. 405 (1913); Tolles v. Winton, 63 Conn. 440, 28 Atl. 542 (1893); Martindale v. Bowers Beach Corp., 13 Del. Ch. 288, 118 Atl. 299 (1921); Commercial Finance Co. v. Brooksville Hotel Co., 98 Fla. 410, 123 So. 814 (1929); Fifiled v. Farmers' Nat'l Bank, 148 Ill. 163, 35 N. E. 802 (1893); Binkley v. Forkner, 117 Ind. 176, 19

case involves not a federal taxing statute, but one which gives each state the right to tax federal property according to its own tax laws. Therefore, the argument for uniformity has no application here. Moreover, the clear intent of Congress seems to have been neither more nor less than to authorize the application of state real estate taxes to the property of the Defense Plant Corporation in the same manner that they are generally applied to the property of other taxpayers, i. e. the controlling consideration is uniformity between taxpayers in a given jurisdiction rather than as between different jurisdictions. Furthermore, in the very act in question, Congress has provided that a state may tax even such buildings as might be classified as personal property, which, in general, the federal statute states shall be exempt from taxation,[5] while it is silent as to the question of machinery over which there has been considerably more controversy. This specific reference to buildings would seem to indicate an intention that other property of doubtful classification, such as machinery, should be taxable as real property or not according to the practice of the particular state involved. In the light of these facts, it is submitted that the decision of the Pennsylvania Supreme Court, applying local law,[6] is sound.

Torts—Parent and Child—Liability of Parent for Torts of Minor Child—Plaintiff's child was beaten and severely injured by defendants' minor son. The statement of claim averred that defendants' son had a vicious, malignant disposition, that he had been in the habit of beating smaller children, that defendants knew of such traits and habits and encouraged their son in such conduct by resenting the admonitions and remonstrances of other adult persons. Defendants filed an affidavit of defense raising questions of law. *Held,* judgment sustaining the affidavit reversed. The averments are sufficient to charge defendants with negligence. Parents who are aware of a child's vicious disposition have an affirmative duty to exercise that control which they have over the child when they know or should know that injury to another is likely to result from failure to restrain the child. *Condel v. Savo,* 350 Pa. 350, 39 A. (2d) 51 (1944).

N. E. 753 (1888); Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa 57 (1876); L. & M. Mercantile Co. v. Wimer, 94 Kan. 573, 146 Pac. 1162 (1915); Johnson v. Wiseman, 4 Metc. 361 (Ky. 1863); Roderick v. Sanborn, 106 Me. 159, 76 Atl. 263 (1909); Pierce v. George, 108 Mass. 78 (1871); Sequist v. Fabiano, 274 Mich. 643, 265 N. W. 488 (1936); State Saving Bank v. Kercheval, 65 Mo. 683 (1877); Shipler v. Potomac Copper Co., 69 Mont. 86, 220 Pac. 1097 (1923); Bankers Life Ins. Co. v. Ohrt, 131 Neb. 858, 270 N. W. 497 (1936); Reno Electrical Works v. Ward, 51 Nev. 291, 274 Pac. 196 (1929); Mortgage Bond Co. v. Stephens, 181 Okla. 419, 74 P. (2d) 361 (1937); Helm v. Gilroy, 20 Ore. 517, 26 Pac. 851 (1891); Voorhis v. Freeman, 2 W. & S. 116 (Pa. 1841); Arlt v. Langley, 56 S. D. 79, 227 N. W. 469 (1929); Darrar v. N. C. & St. L. Ry., 162 Tenn. 313, 36 S. W. (2d) 95 (1930); Danville Holding Corp. v. Clement, 178 Va. 223, 16 S. W. (2d) 345 (1941); Snuffer v. Spangler, 79 W. Va. 628, 92 S. E. 106 (1917); Gunderson v. Swarthout, 104 Wis. 186, 80 N. W. 465 (1899).

5. "Such exemption [of personalty from state and local taxation] shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes." 55 STAT. 248 (1941), 15 U. S. C. A. (App.) § 610 (1943).

6. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." Erie R. R. v. Tompkins, 304 U. S. 64, 78, 58 Sup. Ct. 817, 822, 82 L. Ed. 1188, 1194 (1938). See Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368, 401, 13 Sup. Ct. 914, 927, 37 L. Ed. 772, 786 (1893) (dissenting opinion); Collector v. Day, 11 Wall. 113, 124, 20 L. Ed. 122, 125-6 (U. S. 1871).

The common law rule is that the relationship between parent and child does not of itself render a parent liable for the torts of his child.[1] On the other hand ,it is equally clear that the parent may be liable if he participates in the tort,[2] if the child acts as his agent [3] within the scope of authority,[4] or if the parent's *own negligence* results in the commission of the tort by the child.[5] It is the last category, the parent's own negligence, which forms the basis of liability in the instant case, such negligence consisting of a failure to control the known vicious propensities of the child. Such a view is adopted by the Restatement of Torts,[6] and the decision seems to be a recognition of this type of tort liability in Pennsylvania. An interesting analogy may be drawn between the duty of a parent to control his reckless child and the duty of a possessor of land to control his licensee. In a recent Pennsylvania case [7] a person standing outside his home was accidentally killed by a bullet fired from a gun in a city park. The court held that the frequent occurrence of reckless shooting not only gave the defendant city notice of the dangerous manner in which its licensees were conducting themselves but also opportunity through the park officials to control such conduct. An affirmative duty was thus imposed on the city landowner to control a dangerous activity on its property of which it had knowledge, and

1. Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325 (1899); Swanson v. Crandall, 2 Pa. Super. 85 (1896); White v. Seitz, 342 Ill. 266, 174 N. E. 371 (1931); Bunting v. Goldstein, 283 Pa. 356, 129 Atl. 99 (1925).

2. Recovery has been allowed for participation in the child's tort where the parent: (1) Directed the act. Trahan v. Smith, 239 S. W. 345 (Tex. Civ. App. 1922). (2) Consented to its commission. Sharpe v. Williams, 41 Kan. 56, 20 Pac. 497 (1889); Ryley v. Lafferty, 45 F. (2d) 641 (N. D. Idaho 1930). (3) Ratified the act and accepted its benefits. Hower v. Ulrich, 156 Pa. 410, 27 Atl. 37 (1893); Howell v. Norton, 134 Miss. 616, 99 So. 440 (1924). These decisions might easily have turned on well-known principles of agency, yet "the courts have treated them as special bases of liability and have regarded them as governed by their own peculiar principles." HARPER, TORTS (1933) § 283.

3. Teagarden v. McLaughlin, 86 Ind. 476, 44 Am. Rep. 332 (1882); Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134 (1916).

4. Assuming the agency relationship, a parent is not liable for his child's tort committed outside the scope of the authority. Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101 (1885); Smith v. Jordan, 211 Mass. 269, 97 N. E. 761 (1912).

5. Courts have recognized three general situations in which a parent may thus be negligent: (1) By entrusting to a child a "dangerous instrument" (usually firearms or explosives), thus constituting an unreasonable risk to others. Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013, 53 L. R. A. 789, 96 Am. St. 475 (1901); Shaffer v. Mowery, 265 Pa. 300, 108 Atl. 654 (1919); see 2 RESTATEMENT, TORTS (1934) § 308, comment *b*. (2) By entrusting to a child a "potentially dangerous instrument" (matches, velocipedes, etc.), knowing of the child's reckless propensities. Broadstreet v. Hall, 168 Ind. 192, 80 N. E. 145, 10 L. R. A. (N. S.) 933 (1907); Gudziewski v. Stemplesky, 263 Mass. 103, 160 N. E. 334 (1928). See Note (1930) 78 U. OF PA. L. REV. 1032. (3) By failing to perform definite acts to control the child when he should recognize that such control is necessary to prevent the child's injuring third persons. Norton v. Payne, 154 Wash. 241, 245, 281 Pac. 991, 992 (1929); Ryley v. Lafferty, 45 F. (2d) 641 (N. D. Idaho 1930). But there is no duty in the absence of knowledge of the necessity of exercising control of child. Swanson v. Crandall, 2 Pa. Super. 85 (1896).

6. 2 RESTATEMENT, TORTS (1934) § 316: "A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control."

7. Stevens v. Pittsburgh, 129 Pa. Super. 5, 194 Atl. 563 (1937), adopted the opinion in 329 Pa. 496, 198 Atl. 655 (1938) (the court considered the measure of care arising out of the ownership and maintenance of the park by the city the same as that which would rest upon a private owner of the same property).

the Restatement of Torts [8] was cited with approval.[9] Before liability will attach to a landowner for failure to control his licensee's illegal conduct he must be present and able to prevent such conduct.[10] Here the analogy breaks down, for the instant case goes further by attaching liability to the parents who were not present when their unruly child committed the battery. But the parent's opportunity to train and guide his child plus his right to discipline gives the parent a means of exercising a restraining influence, even though he is not actually present when his child commits the tort, comparable to that exercised by a possessor of land who is present when his licensee commits the tort. The instant case is evidence of the present tendency of the courts to enlarge the scope of the parent's liability.[11]

Trusts—Power of Trustee to Abandon Interest in Insurance Policy—S assigned assets including insurance policies on his life to H, trustee for the benefit of certain creditors, among whom was plaintiff B. & L. Upon S's failure to pay a premium call, the policies being borrowed up to their cash surrender value, H called upon the B. & L. to contribute a pro rata share of the premium. The B. & L. was by now in formal liquidation; L had been appointed liquidating trustee. The B. & L. paid its share but was unable to meet the next premium called for by H. Upon request from H, L wrote stating that he waived further participation in the policy. The other creditors paid the B. & L.'s share. S died a year later. Then the B. & L. sued H for a pro rata share of the proceeds of the policy on the theory that L had no power to abandon its rights in the policy. *Held* (two justices dissenting), for H. By the terms of the agreement naming him liquidating trustee, L had the power to abandon trust assets and had done this by his letter to H, which invoked the doctrine of equitable estoppel against the B. & L. *In re Pearlman's Estate,* 348 Pa. 488, 35 A. (2d) 418 (1944).

A trustee may abandon trust property or claims provided he exercises reasonable prudence in so doing.[1] But whether he should abandon under existing circumstances is a matter of business discretion and has been so viewed by the courts.[2] It would seem that the problem should be approached

8. 2 RESTATEMENT, TORTS (1934) § 318: "If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor (a) knows or has reason to know that he has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control."

9. Stevens v. Pittsburgh, 129 Pa. Super. 5, 19, 194 Atl. 563, 568 (1937).

10. 2 RESTATEMENT, TORTS (1934) § 318.

11. Harper and Kime, *Duty to Control Conduct of Another* (1934) 43 YALE L. J. 886, 893-895; (1932) 17 CORN. L. Q. 178; (1934) 19 CORN. L. Q. 643; (1934) 32 MICH. L. REV. 872.

1. RESTATEMENT, TRUSTS (1935) § 192; 2 SCOTT, TRUSTS (1939) § 192.

2. *In re* Hartje's Estate, 320 Pa. 76, 181 Atl. 497 (1935); *In re* Coate's Estate, 273 Pa. 201, 116 Atl. 821 (1922); Provident Life & Trust Co. v. Fidelity Insurance, Trust & Safe Deposit Co., 203 Pa. 82, 52 Atl. 34 (1902); Reynolds v. Cridge, 131 Pa. 189, 18 Atl. 1010 (1890).

from the point of view of the trustee as of the time he decided to abandon or, more properly, waive. The liquidating trustee was not obligated to expend his own funds nor pledge his personal credit.[3] The B. & L. had neither cash nor other assets; the policies had no cash surrender value; and the trustee was either unable to borrow elsewhere (with the B. & L.'s contingent interest in the policy as the sole security) or else he deemed such a procedure unprofitable and unwise.[4] However, the B. & L.'s interest would be of economic value only if the premium calls were met. The B. & L. was unable to pay the call. Therefore, whether the trustee waived or not should have no effect on the legal result, unless someone else were obligated to pay the call.[5] H, as trustee for the benefit of creditors, was bound to preserve as many assets for the creditors as possible. In his discretion he was given the power to borrow to accomplish this.[6] However, he could not by borrowing prejudice the interest of the other creditors in the trust property in order to preserve the contingent interest of the B. & L. in the policies.[7] H, like L, was not obligated to expend his own funds nor pledge his personal credit for the benefit of the B. & L. The policies, as noted, had no cash surrender value and H also had no trust funds available. Therefore it would seem that H was unable to meet the premium call on behalf of the B. & L.[8] But if it be held that the liquidating trustee had no power to abandon, what right of the B. & L. is the court protecting? True, it had a right to a pro rata share of the proceeds of the policy upon S's

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3. RESTATEMENT, TRUSTS (1935) § 192; 2 SCOTT, TRUSTS (1939) § 170.20. If the trustee advances his own money to pay expenses properly incurred in the administration of the trust, he is entitled to reimbursement out of the trust estate. But the trustee runs the risk that such an outlay will not be considered proper by the Court.

4. *In re* Casani's Estate, 342 Pa. 468, 470, 21 A. (2d) 59, 60 (1941); RESTATEMENT, TRUSTS (1935) § 174; 2 SCOTT, TRUSTS (1939) § 174. A trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.

5. The Commercial National Bank, a creditor of Pearlman and a beneficiary under the same trust agreement as the B. & L., also was unable (being in receivership) to join with the other creditors in a loan to Hardt, trustee, to pay a premium call in 1936. It was thereupon contended by Hardt, trustee, just as in the instant case, that the bank had forfeited its right to participate in the proceeds of the policies. But the District Court of the United States for this district held to the contrary and refused to penalize the bank because it had not joined in the loan. Reed v. Hardt, 46 F. Supp. 984 (E. D. Pa. 1942), *aff'd*, 137 F. (2d) 705 (C. C. A. 3d, 1943). But it is to be noted that not a single case is cited to support either of these decisions. Furthermore, Hardt, trustee, was able to borrow on the policies to pay the premium calls in 1938, 1939, and 1940. There was no showing that Hardt could not have done this in the year 1936 also, which is when the bank was unable to "lend" Hardt, trustee, money to keep the policies in force. The court also held that the creditors had "lent" money to Hardt to pay the bank's share of the premium call. But in the instant case, the creditors expressly refused to "lend" Hardt money if the B. & L. were allowed to maintain its interest in the policy. It is, therefore, submitted that even if the decision in Reed v. Hardt be correct, it is distinguishable from the instant case.

6. Instant case at 495, 35 A. (2d) at 421. This power is referred to in Article XI (b) of the trust agreement entered into by Pearlman and his creditors, naming Hardt trustee.

7. The trustee has the duty to deal impartially as between the several beneficiaries, i. e., the trustee should not favor one over the others. RESTATEMENT, TRUSTS (1935) § 183; 2 SCOTT, TRUSTS (1939) § 183.

8. The dissent assumes that Hardt, trustee, could have borrowed money to pay the premium call. Instant case at 495, 35 A. (2d) at 421. If this be the fact, an action might lie against Hardt, trustee, for breach of duty. But if, in the exercise of his sound judgment and discretion, Hardt deemed borrowing unwise, then no action would lie.

death. However, if the policies lapsed or were forfeited then its contingent right was worthless. The other creditors had an equal right to the proceeds of the policies, but by being able to pay the premium calls they were able to turn it into value. Had these creditors paid only their share of the premium (and the face of the policy had been reduced proportionately)[9] it is doubtful that the Court would have permitted the B. & L. to share in the proceeds. In the instant case, it was stipulated that the other creditors agreed to lend funds to H to pay the B. & L.'s call only if they then acquired its further interest in the policies. It would seem incongruous to permit the B. & L. to maintain a contingent right it is admittedly incapable of turning into value, opposed to the long standing right of general creditors to share in as many assets of the debtor as can be made available.

9. The face value of the policy was $300,000. The B. & L.'s proportionate interest was 8.88792%, that of the other creditors, 91.11208%. If the B. & L.'s share of the premium call had not been paid, the face value of the policy would have been reduced to $273,336.24.